Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

Advanced Communication Provisions of the Twenty-First Century Communications and Video Accessibility Act of 2010	)))	CG Docket No. 10-213

To: The Commission

REPLY COMMENTS OF VONAGE HOLDINGS CORPORATION

Vonage Holdings Corporation ("Vonage") submits these reply comments in response to Public Notice, DA 10-2029, released October 21, 2010 (the "Public Notice"), regarding the Commission's implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010,[1] and to respond to certain aspects of the comments filed by Words+, Inc. et al. ("Words+") and the University of Wisconsin's Trace R&D Center ("Trace R&D Center"), respectively, on November 22, 2010.

Both Words+ and the Trace R&D Center misconstrue the plain language of the Accessibility Act and misinterpret the underlying legislative intent. Giving credence to such mistaken arguments would not only run afoul of clearly expressed legislative intent – it would also be contrary to the public interest. Vonage addresses these commenters' misconceptions and urges the Commission not to be misled by their inaccuracies and omissions.

I. Contrary to the Comments of Words+, Congress Made Clear Interconnected VoIP Remains Subject to Section 255

In its Comments, Words+ states "we are not sure that it is easy to draw a distinction between specific services that are covered in the older definitions and policies covered under

[1] Pub. L. No. 111-260, 124 Stat. 2751 (2010), *amended,* Pub. L. No. 111-265, 124 Stat. 2795 (2010) (collectively, the "Accessibility Act").

section 255 of the Telecommunications Act and those services covered in the new Act."[2] Vonage would like to dispel Words+'s uncertainty on this issue by pointing out that Congress did, in fact, draw just such a distinction in Section 716. As other commenters have noted,[3] Section 716(f) is clear and unambiguous in stating:

> The requirements of this section shall not apply to any equipment or services, *including interconnected VoIP service*, that are subject to the requirements of section 255 on the day before the enactment of the Twenty-First Century Communications and Video Accessibility Act of 2010. Such services and equipment shall remain subject to the requirements of Section 255.[4]

Since interconnected VoIP service is already subject to Section 255[5] of the Communications Act, Section 716(f) makes clear that interconnected VoIP is not subject to Section 716 of the Accessibility Act. The Commission should not disregard this explicit statutory language in adopting implementing regulations.

II. Adopting the Trace R&D Center's Construction of Section 716's "Achievable" Standard and 716(j)'s Rule of Construction Would Violate the Act and Congressional Intent

The Trace R&D Center Comments similarly present an inaccurate interpretation of two important Accessibility Act provisions. Section 716 of the Accessibility Act provides that its accessibility requirements need not be met in regard to particular services and equipment if such requirements are not achievable "with reasonable effort and expense."[6] Vonage and other

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[2] Comments of Words+, Inc. et al., at 2 (filed Nov. 22, 2010) ("It is our understanding that traditional voice services are covered under Section 255 of the Telecommunications Act while next generation advanced communication services such as. . . VoIP. . . are covered under the new definitions put forward by the Twenty−First Century Act.").

[3] *See, e.g.,* Comments of Verizon at 2, 6; Comments of Telecommunications Industry Association at 20; Comments of T-Mobile USA, Inc. at 2; Comments of Motorola at 9; Comments of Consumer Electronics Association at 17; Comments of AT&T at 4.

[4] Accessibility Act of 2010 § 716(f) (emphasis added).

[5] 47 C.F.R. § 255.

[6] Accessibility Act of 2010 § 716(g).

commenters[7] recognize that the definition of "achievable" should be flexibly construed in light of the four achievability factors outlined in Section 716.[8] As Vonage discussed in its initial Comments, these factors make it clear that the definition of achievable is a flexible one that varies in accordance with what is reasonable under the circumstances.[9] For example, if the cost of meeting the requirements is unduly expensive in relation to the revenues generated from the product or service, then meeting the requirements is not achievable. Similarly, if meeting the requirements would inhibit or, as a practical matter prohibit, the development of new communications technologies, then meeting the requirements in regard to those new communications technologies is not achievable.

The Trace R&D Center, however, ignores the flexibility afforded by the four achievability factors outlined in Section 716, and instead urges application of a more burdensome definition of "achievable" in construing it as a "higher standard than the term 'readily achievable' as used in Section 255 of the Communications Act and in the Americans

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[7] *See, e.g.,* Comments of AT&T at 8; Comments of the Consumer Electronics Association at 10 ("Moreover, the 'achievable' standard is less burdensome than the 'undue burden' standard that derived from the Americans with Disabilities Act ('ADA') but was removed from earlier versions of the legislation...."); Comments of the Information Technology Industry Council at 5 ("As the cost or complexity of implementing a particular solution increases, the drag on investment and innovation increases."); Comments of Verizon at 4.

[8] Accessibility Act of 2010 § 716(g). The factors to be considered are as follows:

> (1) The nature and cost of the steps needed to meet the requirements of this section with respect to the specific equipment or service in question.
>
> (2) The technical and economic impact on the operation of the manufacturer or provider and on the operation of the specific equipment or service in question, including on the development and deployment of new communications technologies.
>
> (3) The type of operations of the manufacturer or provider.
>
> (4) The extent to which the service provider or manufacturer in question offers accessible services or equipment containing varying degrees of functionality and features, and offered at differing price points.

[9] *See* Comments of Vonage Holdings Corp., at 4-5.

with Disabilities Act ('ADA')."[10] In providing four factors for the Commission to consider in making determinations of "reasonable effort and expense" under Section 716, Congress articulated a different, more flexible, framework than the ADA's "undue hardship" standard. Congress took deliberate steps to shape Section 716's achievability standard to accommodate the marketplace realities facing equipment manufacturers and service providers. The Section 716 "reasonable effort and expense" factors are designed to foster continued technological advancement by precluding overly burdensome requirements that would effectively stifle innovation. The unreasonably inflexible interpretation urged by The Trace R&D Center therefore misinterprets Congressional intent and is contrary to the public interest.

Congress directed the Commission to consider four factors when determining whether requirements of a certain provision are achievable, including: the nature and cost for the specific equipment or service, technical and economic impact on the manufacturer or provider, manufacturer or provider's type of operations, and whether the manufacturer or provider offers other accessible equipment or services at different price points. Accordingly, such factors should be considered by the Commission in flexibly construing exceptions to accessibility requirements in instances when the requirements are not achievable with reasonable effort and expense.

The Trace R&D Center is likewise mistaken in its interpretation of the rule of construction articulated in Section 716(j).[11] The language of section 716(j) is clear in stating that not every device or service must be accessible for every disability. To the extent there is any doubt, the Committee Report eliminates it by explaining that the "Committee does not intend to

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[10] Comments of the University of Wisconsin's Trace R&D Center, at 3-4 (filed Nov. 22, 2010) ("Trace R&D Center Comments") (claiming "it is arguable that the proper standard is similar to the ADA new construction standard, which requires accessibility unless it is 'structurally impracticable.' This is a significantly higher standard," and the "standard should be interpreted similarly to the 'undue hardship' standard of the ADA").

[11] Trace R&D Center Comments at 9 ("The FCC approach in Section 255 regarding features of products, rather than product lines, is thus consistent.").

require that every feature and function of every device or service be accessible for every person with any disability."[12] As explained by Vonage in its original Comments in this proceeding, such a requirement would be economically inefficient, as well as clearly contrary to Congressional intent.[13] Rather than requiring every device or service to be accessible for every disability, the rule of construction ensures that people with disabilities have reasonable access to a reasonable number of devices or services within each product line offered by the manufacturer or service provider.

Requiring that each individual device or service be considered, as urged by the Trace R&D Center, rather than looking across product lines would be inconsistent with the rule of construction adopted for section 716. In directing the Commission "to consider whether and to what extent the manufacturer or service provider in question has made available a range of accessible products and services with varying functionality and offered at different price points," "[t]he Committee intends that the Commission interpret this factor in a similar manner to the way it has implemented its hearing aid compatibility rules."[14] The Trace R&D Center is therefore mistaken in its assertion that "[i]f every function of a particular device can achievably be made accessible to every disability, every function should be made accessible."[15] Rather, the Commission's hearing aid compatibility rules contemplate "offering models with differing levels of functionality,"[16] and only require that a portion of manufacturers' and carriers' mobile handset

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[12] *See* House Committee on Energy and Commerce, Report 111-563, at 24 (Jul 26, 2010) ("House Report").

[13] *See* Vonage Comments at 5-6.

[14] *See* House Report at 26.

[15] Trace R&D Center Comments at 9.

[16] 47 C.F.R. § 20.19(c)(3)(ii)(B)(4)(ii); 47 C.F.R. § 20.19(d)(3)(ii)(B)(4)(ii).

models comply with the statute's technical standards.[17] In implementing its hearing aid compatibility rules, the Commission emphasized the importance of "allowing [the industry] the necessary flexibility for developing a range of solutions to meet consumers' needs while keeping up with the rapid pace of technological advancement."[18] The Commission should adopt a similar approach to Section 716's rule of construction, consistent with Congressional intent.

III. Conclusion

Vonage Holdings Corporation respectfully urges that the Commission, when promulgating regulations to implement Section 716 of the Accessibility Act, take into consideration the express statutory directive that services and devices subject to section 255 of the Communications Act on the date of enactment of the Accessibility Act, including interconnected VoIP, are *not* subject to the requirements of the Accessibility Act. To do otherwise would result in regulations that would be unnecessarily complicated and burdensome as difficult to interpret, difficult to comply with, and difficult to enforce. The Commission should also implement the congressional mandate that accessibility requirements be excused if not achievable with *reasonable* cost and effort. The Commission's rules should be flexible enough to foster continued innovation and investment and accommodate the variance in technology and function that make it possible to offer devices and services to all consumers. Any other result would be contrary to legislative intent and the public interest. Finally, Vonage

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[17] *See, e.g.,* 47 C.F.R. § 20.19(c)(1)(i)(B) (requiring wireless handset manufacturers offering more than six models ensure that "at least one-third of its handset models offered to service providers (rounded down to the nearest whole number)" comply with the statute's technical standards); 47 C.F.R. § 20.19(d)(2)(i) (requiring that, for each digital air interface for which it offers wireless handsets to service providers, each Tier I carrier must "ensure that at least one-third of the handset models it offers" comply with the statute's technical standards).

[18] *Amendment of the Commission's Rules Governing Hearing Aid-Compatible Mobile Handsets*, WT Docket No. 07-250, Policy Statement and Second Report and Order and Further Notice of Proposed Rulemaking, 25 FCC Rcd 11167, ¶ 18 (rel. Aug. 5, 2010) (also pledging to "continue to account for technological feasibility and marketability as we promulgate rules pertaining to hearing aid compatibility, thereby maximizing conditions for innovation and investment").

urges the Commission to interpret the Section 716(j) rule of construction appropriately, in accordance with clearly articulated Congressional intent, so that service providers and manufacturers may look across product lines and need not ensure each and every device or service is accessible for every disability.

Respectfully submitted,

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